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Mohammad bin Abdullah v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–43 OF 2006
HASAN LAH, AHMAD MAAROP AND AZHAR MA'AH JJCA
3 DECEMBER 2010

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Criminal Law — Dangerous Drugs Act 1952 — s 39B(1)(a) — Trafficking in 2,018.04g of cannabis — Whether accomplices' evidence corroborated — Admissibility of similar fact evidence of previous drug trafficking activities — Whether absence of accused finger-print evidence fatal to prosecution case — Whether charge proven beyond reasonable doubt — Whether trial judge's failure to state that prosecution case proven was beyond reasonable doubt fatal

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Evidence — Corroboration — Accomplice evidence — Whether sufficiently corroborated — Whether evidence of accomplice in drug trafficking case corroborated by conduct of accused

E

Evidence — Similar fact evidence — Admissibility — Whether evidence of previous drug trafficking activities properly admitted

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PW8 and his team of policeman ambushed a car ('the said car') pursuant to information received about drug trafficking activity. Upon being blocked by two police cars, the said car went into reverse and collided into the rear police car. The appellant who was driving the said car was then arrested. The appellant had put up a struggle. PW6 and PW7 who were passengers in the said car were also arrested. All three of them appeared worried and restless. When PW8 questioned them as to whether they had any prohibited items in the car, the appellant answered saying 'Ada barang ganja bawah kusyen sebelah'. A bag ('P9') containing cannabis was then recovered by PW8 from under the front passenger seat of the said car. The owner of the car, PW5, testified that the appellant had borrowed the said car from him and that no one else had borrowed the car. PW5 also confirmed that P9 did not belong to him. According to PW6, the appellant had asked PW6 to contact him if anyone was interested in obtaining cannabis. PW6 had informed the appellant that a man known as 'Abang Puchong' required cannabis. PW6 and PW7 had then travelled in the said car with the appellant to deliver the cannabis ordered by Abang Puchong. The appellant claimed that he had borrowed the said car upon being asked to do so by PW6. As the appellant was driving PW6 and PW7 to meet one Abang Puchong, the said car was blocked by the police cars. The appellant also claimed that in reply to PW8's question as the whether there was

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any 'barang salah', he had answered 'Tidak ada'. The appellant was convicted of the offence of trafficking in 2,018.04g of cannabis under s 39B(1)(a) of the Dangerous Drugs Act 1952. The appellant appealed, inter alia, on the grounds that: (a) the conviction was unsafe because PW6 and PW7 were accomplices and there were no other corroborative evidence to implicate the appellant to the crime; (ii) the appellant's purported admission was involuntary because as he was assaulted by the police; (iii) that there were no fingerprints that could relate the drugs to the appellant.

Held, dismissing the appeal:

(1) PW6 and PW7 were credible witnesses and most of their evidence were not challenged by the defence. There was also corroboration from the conduct and behaviour of the appellant when the car was ambushed by the police party and the appellant's deliberate lie to PW5 as to reason for borrowing his car (see para 41).

(2) The evidence of an accomplice may be corroborated by the conduct of the accused. Such conduct must positively show or tend to show the truth of the accomplice's story that the accused committed the offence (see para 43).

(3) According to PW7, prior to that incident they had delivered cannabis to Abang Puchong. The probative value of the similar fact evidence adduced through PW7 far outweighed its prejudicial effect. The evidence of PW7 was admissible to show knowledge or intention of the appellant and that possession was not accidental (see para 57).

(4) Since it was not put to PW6 and PW7 when they were being cross-examined that the cannabis belonged to them, the fingerprint evidence had little value or significance (see para 67).

(5) The totality of the evidence proved conclusively that the incriminating drugs belonged to the appellant. The prosecution had proved mens rea possession of the drugs by the appellant. Although the trial judge did not say in her judgment that the prosecution had proved its case against the appellant beyond reasonable doubt, she had said that the defence failed to create any reasonable doubt in the prosecution's case. This could only mean that the case against the appellant had been proved beyond reasonable doubt (see paras 85–86).

[Bahasa Malaysia summary

PW8 dan pasukan polis telah menyerang hendap sebuah kereta ('kereta tersebut') berikutan maklumat yang diterima mengenai aktiviti pengedaran dadah. Apabila dihalang oleh dua buah kereta polis, kereta tersebut mengundur ke belakang dan berlanggar dengan bahagian belakang kereta polis. Perayu yang memandu kereta tersebut kemudiannya ditahan. Perayu

telah cuba bergelut. PW6 dan PW7 yang merupakan penumpang kereta tersebut juga ditahan. Ketiga-tiga mereka kelihatan risau dan resah. Apabila PW8 menanyakan mereka sama ada mereka memiliki barang-barang yang dilarang di dalam kereta, perayu menjawab dengan berkata 'Ada barang ganja bawah kusyen sebelah'. Sebuah beg ('P9') kemudiannya diambil oleh PW8 daripada bawah tempat duduk penumpang kereta tersebut. Pemilik kereta tersebut, PW5 memberi keterangan bahawa perayu telah meminjam kereta tersebut daripadanya dan tiada orang lain yang meminjam kereta tersebut. PW5 juga mengesahkan bahawa P9 bukan miliknya. Menurut PW6, perayu telah menyuruh PW6 untuk menghubunginya jika ada sesiapa yang berminat untuk mendapatkan kanabis. PW6 telah memaklumkan kepada perayu bahawa seorang lelaki yang dikenali sebagai 'Abang Puchong' memerlukan kanabis. PW6 dan PW7 telah menaiki kereta tersebut bersama perayu untuk menghantar kanabis yang dipesan oleh Abang Puchong. Perayu mendakwa bahawa dia telah meminjam kereta tersebut apabila disuruh oleh PW6. Apabila perayu memandu PW6 dan PW7 untuk bertemu dengan Abang Puchong, kereta tersebut dihalang oleh kereta-kereta polis. Perayu juga mendakwa sebagai jawapan kepada soalan PW8 sama ada terdapat 'barang salah', dia menjawab 'Tidak ada'. Perayu telah disabitkan dengan kesalahan mengedar 2,018.04g kanabis di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952. Perayu merayu, antara lain, atas alasan bahawa: (a) sabitan adalah tidak selamat kerana PW6 dan PW7 adalah rakan-rakan jenayah dan tiada keterangan menyokong untuk mengaitkan dengan jenayah; (ii) pengakuan perayu bukan secara sukarela kerana dia dikecam oleh polis; (iii) bahawa tiada cap jari yang boleh mengaitkan kesemua dadah dengan perayu.

Diputuskan, menolak rayuan:

(1) PW6 dan PW7 ada saksi-saksi kredibel dan kebanyakan bukti mereka tidak dicabar oleh pihak pembelaan. Tiada keterangan menyokong daripada tingkah laku dan kelakuan perayu apabila kereta tersebut diserang hendap oleh pasukan polis dan penipuan sengaja perayu kepada PW5 sebagai alasan untuk meminjam keretanya (lihat perenggan 41).

(2) Bukti seorang rakan jenayah boleh disokong dengan tingkah laku tertuduh. Tingkah laku sebegitu mestilah menunjukkan secara positif atau ke arah menunjukkan kebenaran cerita rakan jenayah bahawa tertuduh yang melakukan kesalahan tersebut (lihat perenggan 43).

(3) Menurut PW7, sebelum insiden, mereka menghantar kanabis kepada Abang Puchong. Nilai probatif bukti fakta yang sama yang dikemukakan menerusi PW7 mengatasi akibat prejudisnya. Bukti PW7 boleh diterima untuk menunjukkan pengetahuan atau niat perayu dan bahawa milikan bukanlah secara tidak sengaja (lihat perenggan 57).

(4) Memandangkan tidak diletakkan kepada PW6 dan PW7 apabila mereka disoal balas bahawa kanabis adalah milik mereka, bukti cap jari mempunyai sedikit nilai atau kepentingan (lihat perenggan 67).

(5) Keseluruhan keterangan membuktikan secara konklusif bahawa dadah terbabit adalah milik perayu. Pihak pendakwaan membuktikan mens rea milikan dadah-dadah oleh perayu. Walaupun hakim bicara tidak menyatakan dalam penghakimannya bahawa pihak pendakwaan telah membuktikan kes terhadap perayu melampaui keraguan yang munasabah, beliau telah menyatakan bahawa pembelaan gagal untuk mewujudkan sebarang keraguan munasabah dalam kes pendakwaan. Ini hanya bermaksud bahawa kes terhadap perayu telah dibuktikan melampaui keraguan yang munasabah (lihat perenggan 85–86).]

Notes

For a case on admissibility, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) para 2613

For cases on accomplice evidence, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1035–1056.

For cases on s 39B(1)(a) of the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 445–592.

Cases referred to

Chua Beow Huat v PP [1970] 2 MLJ 29 (refd)
Datuk Haji Harun bin Haji Idris v Public Prosecutor [1977] 2 MLJ 155 (refd)
Director of Public Prosecutor v Brooks [1974] 2 All ER 840 (refd)
Dowse v Attorney-General, Federation of Malaya [1961] MLJ 249, PC (refd)
Hasamuddin bin Talena v PP [2002] 2 MLJ 408, CA (refd)
Hasibullah bin Mohd Ghazali v PP [1993] 3 MLJ 321, SC (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)
Parlan Dadeh v PP [2008] 6 MLJ 19, FC (refd)
Pendakwa Raya v Mansor bin Mohd Rashid & Anor [1996] 3 MLJ 560, FC (refd)
PP v Chong Boo See [1988] 3 MLJ 292; [1988] 1 CLJ (Rep) 206, HC (refd)
PP v Mohd Roslan bin Desa & Anor [2009] 4 CLJ 824, CA (refd)
R v Baskerville [1916] 2 KB 658 (refd)
TN Nathan v PP [1978] 1 MLJ 134 (refd)
Tunde Apatira & Ors v PP [2001] 1 MLJ 259, FC (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)
Wong Yew Ming v PP [1991] 1 MLJ 31, SC; [1990] 2 CLJ 946 (refd)
Yap Ee Kong & Anor v PP [1981] 1 MLJ 144, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 60(1)
Criminal Procedure Code s 182A

A Dangerous Drugs Act 1952 s 37(da), (da)(vi), 39(1)(a), 39B(2)
Evidence Act 1950 ss 14, 15 133

Appeal from: Criminal Trial No 45–23 of 2001 (High Court, Shah Alam)

GK Ganesan, KN Geetha (N/A) for the appellant.
B *Fatnin bt Yusuf (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

Hasan Lah JCA:

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[1] The appellant was convicted of the offence of trafficking in 2,018.04g of cannabis under s 39(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s 39B(2) of the Act. He was sentenced to the mandatory death penalty. Hence, this appeal.

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[2] His appeal was dismissed by us. We now give our grounds.

CASE FOR PROSECUTION

E **[3]** The case for the prosecution as found by the learned trial judge can be stated as follows.

[4] At about 9pm on 21 December 2000 Inspector Sekaran a/l N Raman ('PW8') received an information about drug trafficking activity at Kampung
F Sri Aman, Puchong, between midnight and 3am on 22 December 2000 by a male Malay driving a Perodua Kancil bearing registration No WGP 1466.

[5] Together with 16 other police officers PW8 proceeded to assemble at a shell petrol station at Bt 13, Puchong. He briefed the police officers of their
G respective role at the impending ambush. After the briefing at about 12.15am on 22 December, he led them to take their respective positions.

[6] About half an hour later D/L Kpl Mohd Khairul informed him by walkie-talkie that a motorcar with registration No WGP 1466 ('the car') had
H passed him. PW8, together with some officers then moved towards Jalan Jurutera. Immediately upon entering Jalan Jurutera he saw the car in front of him. Upon approaching the car, he gave instructions for the other police car behind him to overtake his car and the car and then to block the car from the
I front.

[7] When the other police car blocked the car from the front the car went into reverse and collided into the car that PW8 was in. Arising from this collision the rear bumper of the car was dented, whilst the front bumper of the car that PW8 was in was also dented.

[8] PW8 then rushed towards the car and shouted 'Polis'. With the assistance of D/Kpl Sidek he arrested the driver of the car. The driver of the car was the appellant. There were two other passengers in the car. All of the three persons arrested appeared worried and restless. When PW8 tried to arrest the appellant the appellant struggled and he (the appellant) fell to the ground.

[9] PW8 then conducted a body search of the three persons arrested but did not recover anything incriminating on them. After administering the caution to them PW8 asked them the following question:

> Adakah kamu menyimpan apa-apa barang salah di dalam kereta?

Only the appellant responded to this question. The other two passengers (PW6 and PW7) did not say anything. The appellant said:

> Ada barang ganja bawah kusyen sebelah.

[10] PW8 then conducted a search of the car and found under the front passenger seat of the car a bag bearing the words 'Shayrer USA' ('P9'). Upon opening the bag P9 he found two compressed blocks which he suspected to be cannabis.

[11] The three persons arrested, as well as the exhibits recovered, including the car ('P14') were then brought to Damansara Police Station. PW8 then lodged a report in respect of the arrests which he had made. He handed over the exhibits recovered to the investigating officer, C/Insp Mohd Fadzir bin Othman ('PW9'), later on the same day.

[12] Rashidi bin Abd Rani ('PW5') was the registered owner of the car. He testified that on 21 December 2000, at about 11pm the appellant borrowed the car from him for the purpose of visiting his mother at Jalan Jelatek. He agreed to lend the car to the appellant for about two hours. According to PW5 the appellant often borrowed the car from him. Other than the appellant no one else borrowed the car from him. When he lent the car to the appellant that night he did not leave anything in the said car. The bag P9 did not belong to him.

[13] Md Hassan bin Ahmad ('PW6') testified that he knew the appellant for about six to seven years prior to the incident. He testified that about a month

prior to being arrested on 21 December 2000, he had met the appellant for a meal when the appellant informed him that, if anyone was interested in obtaining cannabis, to contact him.

[14] On 21 December 2000 at about 11pm when he was playing snooker with Amir Azmi bin Hassan ('PW7'), PW6 received a call from a man known to him as 'Abang Puchong' enquiring whether he sold cannabis. PW6 then called the appellant and informed him of Abang Puchong's request to be supplied with two kilos of cannabis to be delivered to Abang Puchong that same night. He then, together with PW7, went to a nearby restaurant to wait for the appellant.

[15] The appellant arrived at the agreed place by driving the car. From there they proceeded towards the direction of Puchong at about 11.30–11.45pm to effect delivery of the cannabis ordered by Abang Puchong. The appellant drove the car, PW6 was seated in the front passenger seat, whilst PW7 seated at the rear seat.

[16] Upon arrival in Puchong at about 12 midnight, the car that he was in was blocked by another car from the front. The appellant then reversed the car and collided into another car that was then at the rear of the car. They were then arrested, handcuffed, then made to lie down on the ground.

[17] The police then questioned them whether they had anything contrary to law with them. He heard the appellant saying 'Barang tersebut berada di bawah kerusi di sebelah pemandu'. The police then recovered the bag P9 from under the front passenger seat of the car.

[18] PW6 testified that prior to his arrest that night he had not seen the bag P9 nor its contents. They did not belong to him. He did not personally see the bag P9 upon entering the car. He only saw the bag P9 after it was recovered by the police.

[19] PW7's evidence corroborated the evidence of PW6. He testified that on 21 December 2000 at about 11pm he was playing snooker at Pandan Indah with PW6. PW6 received a phone call. After the call PW6 informed him that Abang Puchong called. PW6 then asked him to accompany him to a nearby restaurant at Pandan Indah. PW6 also told him that Abang Puchong ordered some 'barang'.

[20] They waited at a restaurant near Pandan Indah for about 15–20 minutes. The appellant then drove up in the car. The appellant informed PW6

that he had brought the 'barang' and that the 'barang' was under the front left seat. PW6 then asked him and the appellant to proceed to Puchong to deliver the 'barang'.

[21] At about 12 midnight when they were near Jalan Jurutera, Puchong a Proton Wira car blocked the car from the front and he heard someone calling out 'Polis'. The three of them were arrested. One of the police officers then asked, 'Ada bawa barang salah?'. The appellant replied and said, 'Ada, di bawah kerusi hadapan'. The police recovered a bag.

[22] The government chemist, Nazaruddin bin Mohamad ('PW1') who had analysed the two compressed blocks testified that they contained a total weight 2,018.04g of cannabis as defined in s 2 of the Act.

THE DEFENCE

[23] The appellant testified that at about 8.30pm on 21 December 2000 he received a phone call from PW6 requesting for assistance to borrow a car to enable PW6 to visit a friend at Puchong. He then borrowed the car from PW5 by giving an excuse that he wanted to visit his mother at Jalan Jelatek.

[24] He then drove the car to meet PW6 at a restaurant at Pandan Indah. When he arrived at the meeting place he saw PW7 was there with PW6. The three of them then proceeded to Puchong in the car.

[25] During the journey to Puchong PW6 received a phone call. After the call PW6 informed him that Abang Puchong requested that he call him upon arrival at a petrol station in Puchong. Upon arrival at a petrol station in Puchong, PW6 asked PW7 to call Abang Puchong. PW7 did so. PW7 then informed them that Abang Puchong asked them to proceed to a residential area in Puchong and that he would be at a Tom Yam Restaurant.

[26] They then proceeded to the agreed place. PW6 directed him to stop at a Tom Yam Restaurant but he did not stop. He continued to drive slowly. He then found his car blocked by another car. He went into a state of shock and panicked. He feared that the persons who blocked his car would harm him. He reversed the car when PW6 told him to do so. In doing so he collided into another car which was at the rear.

[27] They were arrested by the police. One of the police officers then asked, 'Ada membawa apa-apa barang salah di badan atau di dalam kereta?'. He replied 'Tidak ada'. The police then examined the car. A bag was then shown to him. He had sight of the bag only twice, the first time, at the place where the

incident took place, and later, at the Damansara Police Station. The appellant denied knowledge of the contents of the bag P9.

[28] In cross-examination the appellant, inter alia, denied that he was on the way to deliver the bag P9 containing the two compressed blocks to the person who had placed the order for the drugs. He also denied that upon meeting PW6 and PW7 that night in question he informed them that the 'barang' was in the car. He denied that he was the person who placed the bag P9 containing the drugs under the front passenger seat of the car to meet the order made by Abang Puchong through PW6. He also denied having any knowledge of the presence of the cannabis under the front passenger seat of the car in the bag P9.

FINDINGS OF THE LEARNED TRIAL JUDGE

[29] At the end of the prosecution's case the learned trial judge found that the prosecution had successfully proved that the appellant had in his possession the bag P9 containing the two compressed blocks and the appellant had knowledge of the nature of the two compressed blocks. The learned trial judge than invoked the presumption of trafficking in the said drug under s 37(da)(vi) of the Act. Further, the learned trial judge made a finding that the appellant was, in the act of transporting/sending/delivering/supplying the said drugs which constituted an act of trafficking.

[30] With regard to the appellant's defence, the learned trial judge held that the defence that the appellant did not have any knowledge of the drugs placed under the front passenger seat of the car was clearly an afterthought and must therefore be rejected. The learned trial judge further held that the appellant's evidence and explanation was unreasonable and improbable.

[31] With regard to the evidence of PW8 that the appellant had attempted to escape by reversing the car upon the car being blocked by a police car from the front and the appellant's explanation as to why he reversed the car the learned trial judge rejected the appellant's explanation and held that this conduct of the appellant was also evidence of guilty knowledge and clearly showed the appellant had knowledge of the drugs under the front passenger seat of the car.

[32] From the evidence adduced the learned trial judge held that the appellant had every intention of dealing in the drugs. The cannabis recovered belonged to the appellant and at the material time the appellant was trafficking in the said drugs. The learned trial judge therefore held that the defence had

failed to create any reasonable doubt in the prosecution's case.

THE APPEAL

[33] The appellant appealed to this court on several grounds. Before us, learned counsel for the appellant summarised the grounds of appeal as follows:

(a) the conviction was unsafe;

(b) involuntary admission;

(c) the evidence of the fingerprint expert;

(d) the errors of the learned trial judge; and

(e) no finding that the charge against the appellant had been proved beyond reasonable doubt.

CONVICTION WAS UNSAFE

[34] Learned counsel for the appellant submitted that the prosecution relied on the evidence of PW6 and PW7 who testified that the appellant intended to transport the incriminating drugs to one Abang Puchong. PW6 and PW7 were accomplices and there were no other corroborative evidence to implicate the appellant to the crime.

[35] Learned counsel for the appellant then submitted that there was no independent evidence of actual possession. In this connection he argued that mere passive possession was not distribution and the appellant's knowledge of the presence of the incriminating drugs in the car was not sufficient to prove that he was in possession or in control of it given the fact that others had access to the car.

[36] Learned counsel also submitted that the learned trial judge, in her decision, took into consideration the similar fact evidence given by PW7 which was prejudicial to the appellant.

[37] From the evidence adduced by the prosecution we were satisfied that PW6 and PW7 were accomplices as they took part in the commission of the offence. PW6 received a call from Abang Puchong who enquired about the cannabis. After that PW6 called the appellant and told him about Abang Puchong's request to be supplied with two kilos of cannabis and he wanted the cannabis to be delivered to him that same night. The three of them were arrested when they were on their way to deliver the drugs to Abang Puchong. The evidence clearly showed that they had concurred in the commission of the offence.

[38] Section 133 of the Evidence Act 1950 provides that an accomplice shall be a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

[39] The rules relating to accomplice evidence have been laid down by the English Criminal Court of Appeal in *R v Baskerville* [1916] 2 KB 658. The rules have been briefly stated in *Evidence Practice and Procedure*, (3rd Ed) by Augustine Paul at p 978 as follows:

(1) The uncorroborated evidence of an accomplice is admissible, and a conviction founded on such evidence is not illegal.

(2) But it is a rule of practice virtually equivalent to a rule of law that the presiding judge must warn the jury of the danger of convicting on such evidence.

(3) It is also his duty to tell them that nevertheless they can legally convict on such evidence.

(4) When it appears that the judge has not given the required warning, the Court of Appeal will quash the conviction.

(5) One accomplice cannot corroborate another.

(6) The corroboration must be evidence which implicates the accused. Evidence tending merely to show that a crime has been committed is insufficient.

[40] It is trite law that the accomplice must first be found to be credible before the question of corroboration can arise (see *TN Nathan v Public Prosecutor* [1978] 1 MLJ 134). Further, the corroborative evidence must itself be credible (*Yap Ee Kong & Anor v Public Prosecutor* [1981] 1 MLJ 144).

[41] In the instant case the learned trial judge accepted the evidence of PW6 and PW7 which meant that the learned trial judge found them to be credible witnesses. It must be noted that most of the evidence of PW6 and PW7 were not challenged by the defence. As regards PW6 and PW7's evidence the learned trial judge had this to say:

> There is then the unchallenged testimony of SP7 that upon meeting SP6 and SP7, the accused telling them that the 'barang' was under the front passenger seat. If the accused's intention was to suggest as his defence that the drugs recovered from car 'P14' was not his, but belonged to either SP6 or SP7, it is essential that SP6 and SP7's attention be drawn to these suggestions by questions put to them in cross examination in the prosecution's case showing the imputation that the accused intends to make. This is not a technical rule but a rule of essential justice and serves to prevent surprise at trial.

> In this case the accused had allowed SP6 and SP7's evidence of him, informing them, that the 'barang' was under the front passenger seat, to pass by, unchallenged. The accused had failed to give notice of the defence that is going to be made when his turn came to give evidence. It was never put to SP6 and SP7 in turn so much of the defence case as concerns that particular witness, or in which that particular witness had any share. By reason of the accused's failure to do so it must necessarily follow the accused accepts the testimony given by SP6 and SP7 that he informed them that the 'barang' was in the car under the front passenger seat, and by necessary inference, that the accused was the person who placed the 'barang' in the car, which he drove to meet them at the appointed place. The accused must be taken to have accepted that SP6 and SP7 evidence on these points.

[42] With regard to corroboration the learned trial judge found corroboration from the conduct and behaviour of the appellant when the car was ambushed by the police party led by PW8 and the appellant's deliberate lie to PW5 as to reason for borrowing his car at about 11pm on 21 December 2000.

[43] The evidence of an accomplice may be corroborated by the conduct of the accused. Such conduct must positively show or tend to show the truth of the accomplice's story that the accused committed the offence. These principles of law have been clearly stated by the Privy Council in *Dowse v Attorney-General, Federation of Malaya* [1961] MLJ 249 and the Federal Court in *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155.

[44] In *Dowse* one of the issues to be decided by the trial judge was whether the appellant had committed adultery with one Miss Tan. There was a direct conflict of evidence between Miss Tan and the appellant. She deposed that intimacy had taken place between them on the occasions charged; he denied. The trial judge, directing himself that, considering the nature of the issue, he ought not to act on Miss Tan's evidence, unless there was independent corroboration in some material particular, found the corroboration in the appellant's conduct at and after an incident in August 1958. The appellant had, on that occasion, when approached by two old ladies and Miss Tan, agreed to have the girl examined by his doctor to ascertain whether she was pregnant. The trial judge accordingly found the adultery proved.

[45] On appeal to the Privy Council Lord Radcliffe had this to say at p 251:

> The conduct of the appellant is certainly at first sight incriminating. It strongly suggests that he had a guilty conscience with regard to Miss Tan and that the girl whom he found at his gate that night was not the unknown girl whom he had in effect never met which his own story required that she should be. Unless therefore the appellant could offer an explanation of his having acted as he did which would

A remove the prima facie impression his conduct did corroborate Miss Tan's evidence in a material particular and did tend to show that her accusation against him was a true one …

And at p 252, His Lordship opined:

B … Their Lordships have no doubt that evidence, to be corroborative, must be truly probative of the relevant issue; that is, it must positively implicate the accused person and positively show or tend to show the truth of the accomplice's story that the accused committed the offence. A fact which is indifferently consistent with the accomplice's story and the accused's denial of it is neutral and supplies no C corroboration.

[46] In *Datuk Haji Harun*, Suffian LP had this to say:

D As early as 22 February, 1972, the accused already knew that the bank was interested in the TOL land and in part of Benteng, and as Menteri Besar he was in a position to frustrate or approve the bank's project.

When Lim came to hand over the $25,000 at the airport on 16 August, 1972, the accused did not appear surprised. His conduct showed that he had prior knowledge of a donation solicited from and promised by the bank.

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The accused's conduct regarding the balance of the donation also pointed to his guilt, as the judge found. When the accused received the money in the black tin box kept for him in the bank, on 27 March, 1973, why did he not give an official UMNO receipt as was done for the amount previously received at the airport? It is true that he eventually paid all that amount, less a small deduction, into the UMNO F Special Fund account. But nevertheless, if the money received had been a straightforward political donation, with no strings attached, why did he not receive it openly, as the present Prime Minister did when he accepted a political donation of $150,000 from Malayawatta two months before the last general election (p 194), and by cheque which he as a lawyer and Menteri Besar of a very important state must G have known an old established bank would have preferred.

The evidence of an accomplice may be corroborated by the conduct of the accused, and we are of the opinion that the judge was right, on the basis of the accused's conduct, in concluding that the accused was guilty.

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[47] With regard to the appellant's deliberate lie to PW5 as to reason for borrowing his car the learned trial judge made the following observation in her judgment which can be found on pp 151 and 152 of the appeal record:

I In the consideration of whose testimony this court should accept, I agree with the DPP's submission that what the accused did after receipt of SP6's phone call was extremely significant. The fact that the accused immediately approached SP5 to borrow his car, and in requesting to borrow SP5's car, the fact that he lied, was significant. The reason which the accused gave to SP5 for borrowing was not the reason he gave in his testimony in court, that of assisting SP6 to enable SP6 to visit

> a friend, but that he required to enable him visit his mother at Jalan Jelatek, which, in the events that transpired, the accused clearly never intended to do. The accused never intended to visit his mother at all. The true purpose was to meet SP6 instead, which, on facts he actually did. This deliberate lie to SP5 as to reason for borrowing the car which the accused admitted in his testimony, can be taken is a reflection of the accused's consciousness of guilt. I hold that the representation which the accused made to SP5 regarding the purpose of borrowing the car 'P14', being a deliberate lie, can be considered as corroborative evidence against him.

[48] With regard to the appellant's conduct when the car was ambushed by the police party, the learned trial judge held (at pp 154 and 155 of the appeal record):

> As to the events that transpired en route to Puchong, when the car 'P14' was ambushed by a police party led by SP8, SP8 had testified that the accused had attempted to escape by reversing car 'P14' upon the car being blocked by a police car from the front. This conduct and behaviour of the accused is also evidence of guilty knowledge and clearly shows the accused had knowledge of the nature of the thing which he had placed under the front passenger seat of the car that he was driving that night. This conduct of the accused of reversing the car was more consistent with that of a person who was attempting to flee due to the guilty knowledge of the presence of the incriminating drugs that was then present in the car that he was driving. In this situation, I hold that mens rea had been proved.

[49] We were therefore satisfied that the evidence of PW6 and PW7 had been corroborated and the learned trial judge was right in relying on their evidence in her decision.

[50] With regard to the issue of mens rea possession the learned trial judge held that mens rea possession had been proved from the conduct of the appellant in reversing the car when he was ambushed by the police party which was consistent with that a person who was attempting to flee due to the guilty knowledge of the presence of the incriminating drugs in the car.

[51] In the absence of any reasonable explanation by the appellant the effect of this evidence was sufficient for the court to make an affirmative finding that the appellant was in possession of the drugs (see *Parlan Dadeh v Public Prosecutor* [2008] 6 MLJ 19; *Director of Public Prosecutor v Brooks* [1974] 2 All ER 840).

[52] In addition, there was the direct evidence of PW6 and PW7 on this point which had been accepted by the learned trial judge.

[53] With respect, we found no merit in learned counsel's submission on this point. We found no compelling reasons to disturb the finding of the learned trial judge on mens rea possession.

[54] With regard to similar fact evidence PW7 had testified that prior to that incident they had delivered cannabis to Abang Puchong. Learned counsel submitted that that evidence should not be admitted by the court as it was prejudicial to the appellant.

[55] The question for determination was whether that evidence was relevant and admissible pursuant to ss 14 and 15 of the Evidence Act 1950. In *Public Prosecutor v Mohd Roslan bin Desa & Anor* [2009] 4 CLJ 824 pp 830 and 831 this court had this to say:

> [9] In *R v Raju & Ors v R* [1953] 19 MLJ 21, 22 Spenser Wilkinson J ruled:
>
> Generally speaking the evidence of similar facts may be relevant for the following purposes, though this list may not be exhaustive:
>
> (1) To negative accident;
>
> (2) To prove identity;
>
> (3) Where mens rea is the gist of the offence, to prove intention; and
>
> (4) To rebut a defence which would otherwise be open to the accused.
>
> In my opinion it is of the greatest importance when evidence of this kind is tendered that the prosecution should tender it for a specific purpose and that, if it is admitted, it should be made quite clear for what purpose it is admitted.
>
> [10] The propositions laid down in Makin and Boardman has been recognised by the Malaysian courts. In *Junaidi bin Abdullah v Public Prosecutor* [1993] 3 MLJ 217; [1993] 4 CLJ 201 the Supreme Court relied on Lord Morris's judgment in *Boardman* and held:
>
> (4) Where the purpose of adducing evidence of similar facts or similar offences was justifiable on the ground of relevancy and necessity to rebut any defence which would otherwise have been open to the accused (in addition to those under ss 14 and 15 of the Evidence Act 1950), evidence of bad character was admissible in evidence, provided that the probative value of such evidence outweighed its prejudicial effect. There must be a real anticipated defence to be rebutted and not merely crediting the accused with a fancy defence. Here, the evidence of the physical possession of the revolver by another person during the earlier robbery was vital to the defence and relevant under s 11 of the Evidence Act 1950 to cast a reasonable doubt on the prosecution case that the accused was in possession of the revolver at the time of the arrest. Therefore, the prosecution was entitled to adduce evidence to rebut such a defence.

[11] The issue in this case is whether the similarities relied upon by the prosecution were unique or striking to reveal an underlying link between the matters with which it deals, and the allegations against the respondents upon the charge under consideration such that common sense makes it inexplicable on the basis of coincidence. This task is ultimately one of judgment. It must go beyond showing a tendency to commit crimes of this kind. It must be positively probative in regard to the crime now charged.

[56] In *Public Prosecutor v Mohamad Roslan bin Desa* (Criminal Appeal No 05–28 of 2007 (K), the Federal Court, through Ariffin bin Zakaria, (CJ) (Malaya) opined:

[25] The courts below rejected the similar fact evidence on the basis that there was no striking similarity between what happened in the earlier case and the present case. It should perhaps be noted that House of Lords in *Deputy Public Prosecutor v P* had retracted from the test laid down in boardman as to the requirement of 'striking similarity' and said that it was inappropriate to single out 'striking similarity' as an essential element in every case. But following *Boardman* it was held that the essential feature of admissibility of such evidence is whether its probative force in support of the charge is sufficiently great to make it just to admit the evidence notwithstanding that its prejudicial effect on the accused tending to show that he was guilty of another offence. Whether the evidence has sufficient probative value to outweigh its prejudicial effect must in each case be a question of degree.

[26] The test has since been authoritatively laid down by *DPP v P* in terms of probative value as against its prejudicial effect. There is force in saying that the decision in *Deputy Public Prosecutor v P* is in line with ss 14 and 15 of the Evidence Act as 'striking similarity' has never been a requirement of the said sections.

[57] In the present case we were of the view that the probative value of the similar fact evidence adduced through PW7 far outweighed its prejudicial effect. The evidence of PW7 was admissible not because it tends to show that a person committing one offence is likely to commit another but to show knowledge or intention of the appellant and that possession was not accidental (see *Wong Yew Ming v Public Prosecutor* [1991] 1 MLJ 31; [1990] 2 CLJ 946). As such we found that the evidence was rightly admitted by the learned trial judge.

[58] Be that as it may, we found that even without that similar fact evidence there were sufficient evidence to support the learned trial judge's finding of guilt. As such there was no merit on the learned counsel submission on this

point.

INVOLUNTARY ADMISSION

[59] PW8 testified that the appellant, when asked whether there was 'barang salah' in the car, replied that there was cannabis under the front passenger seat. PW8 asked the following question:

> Adakah kamu menyimpan apa-apa barang salah di dalam kereta?.

The appellant then replied:

> Ada barang ganja bawah kusyen sebelah.

[60] In his defence the appellant testified that his car was blocked by a car, he was pulled out of the car and was punched. He sustained injury on his right eye and he was made to lie on the ground, then handcuffed.

[61] Learned counsel for the appellant submitted that, even if PW8's version was true, it was obtained involuntarily because of the assault. Learned counsel for the appellant therefore submitted that the statement made by the appellant was inadmissible. In support of that he cited the case of *Hasibullah bin Mohd Ghazali v Public Prosecutor* [1993] 3 MLJ 321. Learned counsel then referred to the case of *Public Prosecutor v Chong Boo See* [1988] 3 MLJ 292; [1988] 1 CLJ (Rep) 206 where the court held that while an accused person can be convicted on his own confession, in practice the court always looks for corroboration. In the present case, according to learned counsel, there was no such independent corroboration.

[62] Having perused the judgment of the learned trial judge, we found the learned trial judge did not make any reference to the statement made by the appellant in her judgment. She did not take into consideration the appellant's statement when deciding the case against the appellant. As stated earlier, with regard to the appellant's knowledge of the drugs in the car she took into consideration the evidence of PW6 and PW7 that the appellant informed them that the 'barang' which had been ordered was under the front passenger seat. Secondly, the conduct of the appellant in attempting to escape by reversing the car after the car being blocked by a police car from the front and putting up a struggle with the police was conduct consistent with guilt.

[63] The reason why the learned trial judge did not take into consideration the appellant's statement to PW8 in her decision could be found in the submission of the learned deputy public prosecution in the High Court. During the prosecution's case, PW6, PW7 and PW8 had given different

answers given by the appellant to PW8 with regard to the appellant's statement when he was asked 'Ada membawa apa-apa barang salah di dalam kereta?'. It is trite law that the exact words used by the appellant must be proved before the statement could be admitted and approximations are not permitted (see *Hasamuddin bin Talena v Public Prosecutor* [2002] 2 MLJ 408). In view of that the prosecution did not make any submissions on this issue at the end of the prosecution's case.

[64] In the circumstances the statement given by the appellant to PW8 was not an issue before the learned trial judge. As such it was also not an issue before us. We therefore found it unnecessary to dwell upon the subject.

EVIDENCE OF THE FINGERPRINT EXPERT

[65] Learned counsel for the appellant submitted that there were no fingerprints that could relate the drugs to the appellant. He argued that there were possibilities for PW6 and PW7 to have possession over the drugs.

[66] According to the investigating officer, PW9, he sent the bag P9 and the packages containing the cannabis to the fingerprint expert, Chief Inspector Khalid on 23 November 2000. Chief Inspector Khalid failed to lift fingerprints from the exhibits.

[67] As stated earlier the prosecution relied on the evidence of PW6 and PW7 and also the conduct of the appellant to prove that the cannabis was in the possession of the appellant. It was never put to PW6 and PW7 when they were being cross-examined that the cannabis belong to them. Under the circumstances, we were of the view fingerprint evidence assumed little value or significance (see *Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560).

ERROR OF THE TRIAL JUDGE

[68] Learned counsel for the appellant submitted that the learned trial judge erred in relying on the evidence of PW6 and PW7 and in deciding that the bag containing the drugs belonged to the appellant and was to be transported to Abang Puchong. The appellant's version of events were different from that of PW6 and PW7. The appellant's counsel contended that when there were disputed versions, the learned trial judge ought to have given the appellant the benefit of doubt as there were no other independent corroborative evidence.

[69] Learned counsel for the appellant also submitted that the learned trial judge erred in rejecting the appellant defence that he had no knowledge of the

drugs recovered in the car P14 and the drugs did not belong to him just because the appellant's counsel failed to put the appellant's defence to PW6 and PW7 during the cross-examination.

[70] Learned counsel for the appellant further submitted that the learned trial judge, at the conclusion of the trial, found the appellant was trafficking in the drugs by relying on the affirmative evidence. The defence contended that this was a total shift from the earlier decision at the conclusion of the case for the prosecution that the presumption under s 37(da) of the Act was applicable against the appellant.

[71] We were unable to agree with the contention that when the appellant disputed the prosecution's version the learned trial judge ought to have given the appellant the benefit of doubt. At the conclusion of the trial the learned trial judge had to evaluate all the evidence adduced and make her finding. In the instant case the learned trial judge, after carefully evaluating the evidence before her, rejected the appellant's defence and accepted the prosecution's version of what actually took place that night. We reminded ourselves that the learned trial judge had the benefit of observing the demeanour of the witnesses testifying before her. We were satisfied that the learned trial judge had properly and adequately evaluated the evidence adduced. As such there was no merit in the defence's contention that the learned trial judge erred in rejecting the appellant's defence.

[72] With regard to the issue that the defence's version was not put to the prosecution witnesses the learned trial judge said:

> There is then the unchallenged testimony of SP7 that upon meeting SP6 and SP7, the accused telling them that the 'barang' was under the front passenger seat. If the accused's intention was to suggest as his defence that the drugs recovered from car 'P14' was not his, but belonged to either SP6 or SP7, it is essential that SP6 and SP7's attention be drawn to these suggestions by question put to them in cross examination in the prosecution's case showing the imputation that the accused intends to make. This is not a technical rule but a rule of essential justice and serves to prevent surprise at trial.

[73] In *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 the Federal Court held that there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony.

[74] In *Chua Beow Huat v Public Prosecutor* [1970] 2 MLJ 29 Sharma J said: A

> The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross examination, it must follow that he believed that the testimony could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. B

[75] We were satisfied that there was no misdirection by the learned trial judge on this issue. C

[76] Further, it must be noted that the learned trial judge rejected the appellant's defence not only for that reason. The learned trial judge also took into consideration the fact that the appellant had lied to PW5 the reason for him to borrow PW5's car and the appellant's conduct in reversing the car P14 when it was blocked from the front. D

[77] The appellant's explanation was that he reversed the car because PW6 told him to do so. But this issue was not put to PW6 by the defence during the cross-examination of PW6. In our view, the totality of the evidence proved conclusively that the incriminating drugs belonged to the appellant and as such the learned trial judge had not erred when she found, at the conclusion of the trial, that the prosecution had proved mens rea possession of the drugs by the appellant. E F

[78] With regard to the appellant's contention that there was a total shift by the learned trial judge because at first she relied on the presumption of trafficking under s 37(da) of the Act but later at the conclusion of the trial she relied on the affirmative evidence of trafficking we also found no merit in the appellant's contention. G

[79] It was clear from the judgment of the learned trial judge that at the conclusion of the prosecution case she held that on the evidence available the presumption under s 37(da)(vi) of the Act was applicable against the appellant and further, there was affirmative evidence of trafficking against the appellant. In other words the learned trial judge found that the prosecution had proved trafficking by the appellant in two ways at the conclusion of the case for the prosecution. H I

[80] In the High Court the learned deputy public prosecutor submitted that the evidence that the appellant, together with PW6 and PW7 were *en route* to deliver the drugs to Abang Puchong fell squarely within the definition of trafficking.

[81] At the conclusion of the trial the learned trial judge held that at the material time the appellant was in the act of transporting/sending/delivering/supplying of the drugs and that constituted an act of trafficking. As such there was no shifting of stance by the learned trial judge with regard to her finding on the act of trafficking. She had made it clear in her decision at the conclusion of the prosecution case that there was sufficient evidence of trafficking (independent of the presumption under s 37(da) of the Act).

[82] Even if there was a misdirection by the learned trial judge on this issue we found this was a proper case to apply the proviso to sub-s (1) of s 60 of the Courts of Judicature Act 1964 as no substantial miscarriage of justice had occurred. The evidence against the appellant was overwhelming (see *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259). We were satisfied that a reasonable tribunal would have convicted the appellant on the available evidence on a proper direction. In the instant case the appellant was on his way to deliver the drugs to Abang Puchong, the purchaser.

NO FINDING THAT THE CHARGE HAD BEEN PROVED BEYOND REASONABLE DOUBT

[83] Learned counsel for the appellant submitted that in her judgment the learned trial judge did not make a finding that the charge against the appellant had been proved beyond reasonable doubt. In view of that he submitted that the conviction was not safe.

[84] It is true that the learned trial judge did not say in her judgment that the prosecution had proved its case against the appellant beyond reasonable doubt. However in her judgment the learned trial judge said:

> The defence had accordingly failed to create any reasonable doubt in the prosecution's case that on the date, time and place stipulated in the charge the accused had, and knew that he had, during the journey to Puchong to deliver the two compressed blocks of cannabis containing the drugs specified in the charge, to Abang Puchong. This conduct falls squarely into the definition of trafficking as defined in the Act.

[85] Section 182A of the Criminal Procedure Code provides that at the conclusion of the trial the court shall decide whether the prosecution has proved its case beyond reasonable doubt. It is trite law that the general burden of proof lies throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the accused for the offence with which he is charged (see *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169). In our view when the learned trial judge said that the defence failed to

create any reasonable doubt in the prosecution's case it could only mean that the case against the appellant had been proved beyond reasonable doubt. In any event, in our view, the totality of the evidence pointed conclusively to the guilt of the appellant.

[86] We had considered the defence put up by the appellant. We agreed with the finding of the learned trial judge that the defence put up by the appellant when tested against the totality of the evidence adduced was an afterthought. It failed to raise any reasonable doubt in the prosecution's case.

[87] We had carefully scrutinised the evidence on record in this case and examined the judgment of the learned trial judge with the greatest care. We were entirely satisfied that the conviction of the appellant on the charge of trafficking was safe. In the result the appellant's appeal was dismissed. The conviction and the death sentence imposed on the appellant by the learned trial judge were affirmed.

Appeal dismissed.

Reported by Kanesh Sundrum